

This is the third appeal before the Board. Appellant, a 36-year-old secretary, aggravated a back injury while in the performance of duty on September 28, 1998. Her claim was accepted for temporary aggravation of preexisting cervical and lumbar strains. The Office paid appropriate compensation and placed her on the periodic rolls. By decision dated June 7, 1999, the Office terminated appellant's compensation benefits.

In a March 14, 2001 decision, the Board reversed the June 7, 1999 decision, finding that the Office failed to meet its burden of proof in terminating appellant's benefits. The Board found a conflict in medical opinion between Dr. Hampton J. Jackson, Board-certified in orthopedic surgery and appellant's treating physician, and Dr. Harvinder S. Pabla, a Board-certified orthopedic surgeon and the second opinion examiner. The facts of this case as set forth in the Board's decision are incorporated herein by reference.¹

The Office referred the case to Dr. J. Michael Joly, a Board-certified orthopedic surgeon, selected as the referee medical specialist. In a report dated November 29, 2001, he stated:

"I do not believe [appellant's] current back and neck problem is affiliated with moving file folders and office boxes on September 28, 1998.... [I]t is my firm belief that timely and complete resolution of acute cervical, thoracic and lumbar strain occurs within four to six months. Continued symptoms beyond six months, in my opinion cannot be ascribed to low-energy events, such as lifting, and low-energy motor vehicular accidents."

Dr. Joly noted that both lumbar and cervical x-rays were normal. He stated that appellant required no further treatment and would actually benefit from increased physical activity. Dr. Joly opined that appellant should return to an eight-hour workday with restrictions of no sitting or standing in one position for more than 30 minutes, with two to three walking breaks, and no frequent lifting exceeding 10 pounds or occasional lifting exceeding 20 pounds.

By decision dated May 7, 2004, the Office terminated appellant's compensation benefits, finding that Dr. Joly's impartial report represented the weight of the medical evidence. By decision dated March 30, 2005, an Office hearing representative reversed the May 7, 2004 decision, finding that Dr. Joly did not consider all of the medical evidence pertaining to appellant's condition. The hearing representative remanded to the district office for referral to Dr. Joly to review results of a magnetic resonance imaging (MRI) scan, cervical and lumbar electromyogram (EMG) and nerve conduction velocity (NCV) tests appellant underwent in September 2001.

In a November 17, 2005 report, Dr. Joly reviewed the diagnostic studies and concluded that they were normal. He also obtained three lumbosacral spine x-rays during his examination, including a lateral flexion extension view, which were normal with no evidence of past trauma, degeneration or instability. Dr. Joly stated:

"Presently, [appellant] is not suffering from any residuals of the work-related injury from September 28, 1998. In my opinion, the patient is suffering from lack of exercise and lack of gainful employment. Once again, [appellant] has developed the dreaded illness behavior. The illness behavior develops as a result of the patient not [being] encouraged [to] return back to work in a timely fashion and as a result of [appellant] not being encouraged to engage in recreational

¹ Docket No. 00-846 (issued March 14, 2001). The Board also denied appellant's claim for benefits based on an emotional condition.

cardiovascular fitness exercise. I believe her employment-related conditions ceased at the anniversary date of the injury, September 28, 1999.”

Dr. Joly recommended a second opinion EMG/NCS to evaluate appellant’s cervical and lumbar nerve roots and her bilateral carpal tunnel syndrome. He reiterated his prior belief that appellant was not totally disabled from all work solely due to the September 1998 work injury, that she would benefit from exercise and a return to gainful employment with his previously indicated restrictions.

In order to ascertain appellant’s condition, Dr. Joly referred her to undergo NVC, EMG and carpal tunnel syndrome testing with Dr. Salim Y. Mansoor, Board-certified in physical medicine and rehabilitation, which was scheduled for December 14, 2005. Appellant appeared at the examination and underwent NVC testing; however, she refused EMG testing of the right cervical paraspinal muscles, which rendered the EMG testing inconclusive.²

By decision dated March 31, 2006, the Office suspended appellant’s compensation on the grounds that she obstructed a medical examination. By decision dated February 2, 2007, the Board reversed the March 31, 2006 decision and reinstated her compensation benefits. The Board directed the Office to refer appellant to a second impartial medical specialist to resolve the conflict in medical evidence.³

The Office referred appellant to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated April 17, 2007, he opined that there were no residuals of the original work injury. Dr. Hanley stated that the MRI scan did not suggest the basis for an ongoing problem and indicated that she had sustained a minor soft tissue injury which should have resolved by this time. He advised that she had no symptoms, objective findings or work restrictions stemming from the 1998 work injury.⁴

In a notice of proposed termination dated June 7, 2007, the Office, based on Dr. Hanley’s report, found that the weight of the medical evidence demonstrated appellant was no longer disabled due to her September 28, 1998 employment injury. The Office found that Dr. Hanley’s referee opinion was sufficient to resolve the conflict in the medical evidence and constituted the weight of the medical evidence. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination.

In a June 6, 2007 report, received by the Office on June 29, 2007, Dr. Jackson stated:

“[Appellant] returns today, admitting to significant worsening since we saw her last. She says the paraspinal block given on April 27, 2007 worked well for ... three or four days. Since then, she has gotten worse [which] is obvious from the

² Dr. Monsoor noted complaints of mild weakness of the right hand grip, in addition to pain and swelling in the right hand. He diagnosed mild right carpal tunnel syndrome, with no signs of denervation.

³ Docket No. 06-1801 (issued February 2, 2007).

⁴ Dr. Hanley also found that there was no evidence of carpal tunnel syndrome.

examination which shows increased spasm, but no progressive weakness in the legs.”

Dr. Jackson diagnosed chronic spinal stenosis and lumbar disc syndrome.

By decision dated July 24, 2007, the Office terminated appellant’s compensation benefits.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened to order to justify termination or modification of compensation benefits.⁵ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁶ The Office’s burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee the Secretary shall appoint a third physician who shall make an examination.⁸

ANALYSIS

In order to resolve the conflict in the medical evidence, the Office referred the case to a referee medical specialist, Dr. Hanley, who stated in his April 17, 2007 report that appellant had no symptoms, objective findings or work restrictions stemming from the September 28, 1998 work injury. He advised that she had sustained a minor soft tissue injury which should have resolved and noted that MRI scan results did not indicate any basis for an ongoing problem. Dr. Hanley opined that there were no residuals from the original lumbar and cervical injuries. The Office relied on Dr. Hanley’s opinion in its July 24, 2007 decision, finding that appellant had no residuals or continuing disability stemming from her September 1998 work injury and was therefore not entitled to compensation or medical benefits.

The Board finds that Dr. Hanley’s referee opinion negated a causal relationship between appellant’s condition and disability and constituted medical evidence sufficient to establish that she no longer had any residuals from her accepted September 28, 1998 lumbar and cervical strain

⁵ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁶ *Id.*

⁷ *See Mary Lou Barragy*, 46 ECAB 781 (1995); *see also Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁸ *Regina T. Pellecchia*, 53 ECAB 155 (2001).

injuries.⁹ His opinion is sufficiently probative, rationalized, and based upon a proper factual background. The Office properly accorded Dr. Hanley's opinion the special weight of an impartial medical examiner.¹⁰ Although appellant submitted the June 6, 2007 report from Dr. Jackson, this report does not outweigh Dr. Hanley's opinion nor negate the Office's finding that Dr. Hanley's report represented the weight of the medical evidence. Dr. Jackson's report merely restated one side of the conflict which was resolved by Dr. Hanley's referee medical opinion. Accordingly, the Board finds that Dr. Hanley's opinion constituted the weight of medical opinion and supports the Office's July 24, 2007 decision to terminate appellant's compensation and deny any entitlement to continuing disability based on the September 28, 1998 work injury.

CONCLUSION

The Board finds that the Office met its burden to terminate appellant's compensation benefits.

⁹ Appellant contends on appeal to the Board that termination of her compensation was improper because the Office told her it would further develop the medical evidence pertaining to her right-sided carpal tunnel condition, but failed to do so. However, a claim for carpal tunnel was ever accepted by the Office; nor did appellant submit any evidence in support of such a claim. Dr. Joly noted in his November 17, 2005 report that appellant held her right upper extremity in a flexed wrist posture, complaining of carpal tunnel syndrome, and referred her to Dr. Monsoor for carpal tunnel testing in addition to the other diagnostic tests. While Dr. Monsoor did diagnose mild right carpal tunnel syndrome, neither he nor Dr. Joly attributed this condition to factors of appellant's federal employment. In addition, Dr. Hanley indicated in his April 2007 report that there was no evidence of carpal tunnel syndrome.

¹⁰ Gary R. Seiber, 46 ECAB 215 (1994).

ORDER

IT IS HEREBY ORDERED THAT the July 24, 2007 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: May 22, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board